

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

IN RE:  U S WEST COMMUNICATIONS, INC., AND QWEST INC.	DOCKET NO. SPU-99-27
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**ORDER DENYING MOTION TO DISMISS**

(Issued January 12, 2000)

On September 20, 1999, Qwest Communications Corp., LCI International Telecom Corp., USLD Communications Inc., Phoenix Network Inc., and Qwest Communications International Inc. (collectively "Qwest"), and U S WEST Inc. filed a "Joint Application" for an order approving the proposed merger of Qwest Inc. and U S WEST, Inc. (collectively, the "Applicants"), pursuant to IOWA CODE §§ 476.76 and 476.77 (1999). The filing has been identified as Docket No. SPU-99-27.

On December 14, 1999, Qwest Communications Corporation (QCC), an affiliate of Qwest, filed an application pursuant to IOWA CODE § 476.29 for a certificate of public convenience and necessity to provide facilities-based and resold local telecommunications service in Iowa. QCC requested a certificate to provide services in certain exchanges currently served by U S WEST Communications, Inc. (U S West), and GTE Midwest Incorporated. The application was identified as Docket No. TCU-99-44.

On December 23, 1999, QCC filed a request to withdraw its application in Docket No. TCU-99-44. The request was granted, without prejudice, on January 10, 2000.

On December 22, 1999, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a motion to dismiss the Joint Application in this docket. Consumer Advocate states that the Joint Application alleged that Qwest and U S West offer different services with limited overlaps. Based on this allegation, the Applicants allege the proposed merger will have no adverse impact on competition in the Iowa telecommunications markets. Consumer Advocate argues that this statement in the Joint Application, along with other similar statements, is no longer true, because "it now appears that the merger will destroy potential future competition between Qwest and U S West in all of the major population centers in the state." (Motion to dismiss at page 4.) Consumer Advocate also argues that QCC's proposal to offer competitive services in certain U S West exchanges calls into question the merger synergies claimed in the Joint Application, as it appears QCC intends to build facilities that are independent from, rather than complementary to, the facilities of U S West.

Consumer Advocate concludes that the pending Joint Application should be dismissed because it fails to adequately address a known and material factor that the Board must consider in its review of the proposed reorganization, that is, the potential impact of the merger on telecommunications competition in Iowa.

On December 29, 1999, McLeodUSA Telecommunications Systems, Inc. (McLeod), filed a joinder in the Consumer Advocate motion to dismiss. In addition to joining in Consumer Advocate's arguments, McLeod argues that QCC's subsequent withdrawal of its application for a certificate does not affect the motion to dismiss. McLeod argues that QCC's withdrawal without prejudice shows that QCC still intends to offer facilities-based and resold local telecommunications service "in the imminent future."

On December 30, 1999, the Applicants filed a response to the Consumer Advocate motion to dismiss and the McLeod joinder. Applicants argue that the withdrawal of the QCC application in Docket No. TCU-99-44 makes the Consumer Advocate motion moot. Applicants note that QCC had "sound reasons for filing its Application," including pursuit of a nationwide business plan to obtain CLEC authority in all states and the possible use of separate subsidiaries to provide data services.

On January 3, 2000, Consumer Advocate filed a reply to the Applicants' response. Consumer Advocate argues that the Applicants are called upon to explain the QCC application, but have failed to do so. They argue that neither of the reasons advanced by the Applicants (that is, QCC's nationwide business plan and the possible use of separate subsidiaries) is credible. Consumer Advocate further argues it will not be able to adequately address the issues raised by the QCC application through cross-examination at the hearing in this matter. Instead, Consumer Advocate argues the Joint Application should be dismissed and re-filed to

allow time for discovery and filing of testimony regarding issues associated with the QCC application.

Finally, on January 4, 2000, AT&T Communications of the Midwest, Inc. (AT&T), filed a joinder in the motion to dismiss. In addition to the arguments described above, AT&T argues that many of the Applicants' responses to AT&T's earlier data requests are no longer accurate. As one example, in one data request AT&T asked the Applicants how the merged company will combine the services offered and networks maintained by Qwest and U S West. The Applicants responded by stating that "detailed integration planning has not yet begun." AT&T argues that the filing of the QCC application shows that the Applicants "must have made some decisions regarding the activities of [their] affiliates, the combination and marketing of services, and, most critically, plans regarding local competition activities, including the provision of local exchange services in Iowa." "Planning has indeed taken place with respect to how the merged company or its affiliate will provide local exchange service. As we now know, the Applicants have already made plans to introduce a captive CLEC into this state to provide local exchange service." AT&T concludes that the Applicants' responses to data requests have been incorrect or, if correct when made, have not been updated in a timely manner.

The Board will deny the motion to dismiss. The possible competitive impact of the proposed merger has been an issue in this docket since the Joint Application was filed. QCC's application for a certificate did not materially change the nature of

the issue, it only added a specific demonstration of the potential impact of the proposed merger on the ability of Qwest to enter the local exchange market in Iowa. Now that the QCC application has been withdrawn (without prejudice to re-filing), the situation is effectively the same as it was before the QCC application was filed, that is, QCC may at some time in the future file an application for a certificate to provide local exchange services in Iowa. That was true before the QCC application was filed, and it is true now. The intervening events do not justify dismissing the Joint Application.

Consumer Advocate and intervenors have had, and continue to have, time to conduct discovery regarding the QCC application and any possible effect it may have on the Joint Application. The QCC application was filed December 14, 1999, while hearing in this matter will commence on February 1, 2000. This allows six weeks to conduct discovery and prepare for cross-examination on any issues that may be presented by the QCC application, an adequate time to explore the issues.

Moreover, some of the issues Consumer Advocate and intervenors propose to investigate in this docket may be more appropriately considered in a future TCU docket, if QCC ever re-files its application. Issues such as the relationship between QCC and U S West, and any safeguards that may be required to prevent abuse of that relationship, are appropriate issues to consider in connection with an application for a certificate of public convenience and necessity. As noted by Consumer

Advocate, the Board has already seen submission (and withdrawal) of an ILEC's application for CLEC authority in the ILEC's own service territory, see In re: U S West Interprise America, Inc., Docket No. TCU-97-1. QCC's filing is not an entirely novel occurrence, and the Board expects that any and all issues associated with such a filing can be considered in the TCU docket, if the QCC application is ever re-filed.

However, the Board is concerned about the apparent discovery difficulties some of the intervenors are experiencing with the Applicants in this docket. AT&T makes a good argument that the QCC application calls into question some of the Applicants' responses to AT&T's data requests regarding the plans for the merged company. For example, the Applicants responded to data requests concerning plans for the merged company by stating that "detailed integration planning has not yet begun" (response to AT&T Data Request No. 18) or that "the companies have made no decisions regarding the future relationship between or among the companies and their subsidiaries and affiliates" (response to AT&T Data Request No. 8). These responses appear to be inconsistent with the Applicants' claim that QCC has a "nationwide business plan to obtain CLEC authority, both inside and outside the U S WEST region." (Applicants' Response at page 2.) It would seem likely that a "nationwide business plan" to obtain CLEC authority in the U S West region would involve at least *some* "decisions regarding the future relationship between or among"

QCC and U S West. If so, those decisions should already have been provided in response to the AT&T data requests.

The procedural schedule in this case does not allow time for further discovery disputes. The Board has said it before in this docket, but it apparently bears repeating: "There is simply no time available for further extensions of the procedural schedule without dismissing the application for re-filing." See "Order Denying Motion to Compel and Request for Extension of Time," issued in this docket on December 7, 1999. The Applicants *must* provide timely, complete, and updated responses to all discovery or risk dismissal of the Joint Application.

**IT IS THEREFORE ORDERED:**

The motion to dismiss filed on December 22, 1999, by the Consumer Advocate Division of the Department of Justice is denied.

**UTILITIES BOARD**

/s/ Allan T. Thoms

/s/ Susan J. Frye

ATTEST:

/s/ Judi K. Cooper  
Executive Secretary, Deputy

/s/ Diane Munns

Dated at Des Moines, Iowa, this 12<sup>th</sup> day of January, 2000.